United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1091

To be argued by
PETER D. SUDLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1091

UNITED STATES OF AMERICA,
Appellant,

—v.—

RALPH CECCOLINI,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

ARGUMENT

At the outset, it is to be noted that Ceccolini erroneously argues that the Fifth Amendment's Double Jeopardy Clause precludes the Government from taking this appeal. Contrary to Ceccolini's contention, however, Judge Gagliardi specifically found the defendant guilty on Count One and, as a result, if this Court upholds the Government's position with respect to the testimony of Miss Hennessey, "a retrial would not be required . . . ." *United States* v. *Jenkins*, 420 U.S. 358, 365 (1975), citing *United States* v. *Wilson*, 420 U.S. 332, 344-345, 352-353 (1975). Or as stated in *United States* v. *Fayer*, 523 F.2d 661, 664 (2d Cir. 1975), in the event of reversal in this case, there is no need for any further proceedings of any sort having to do with the resolution of factual issues going to the elements of the offense

charged. Thus, this appeal in no way offends the Double Jeopardy Clause and is, accordingly, properly taken.* See, to the same effect, *United States* v. *De Garces*, 518 F.2d 1156 (2d Cir. 1975), where this Court vacated a judgment of acquittal, following the jury's guilty verdict, and remanded the case to the District Court with directions to reinstate the guilty verdict. See, *United States* v. *Beck*, 483 F.2d 203 (3d Cir. 1973), *cert. denied*, 414 U.S. 1132 (1974); *United States* v. *Highfill*, 334 F. Supp. 700 (D. Ark. 1971).

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* Contrary to defense counsel's vituperative claims about the conduct of the prosecution and his erroneous attempt to rely on *United States* v. *Lucido*, 517 F.2d 1 (6th Cir. 1975), the fact of the matter is that defense counsel was in a position to—and did—make his search and seizure contentions at the very outset of trial before opening statements. (Tr. 17-18). At that time, defense counsel explicitly stated that he had no objection to having the trial and the suppression issues proceed together. (Tr. 17; see Tr. 187-188). Moreover, although not the preferred procedure, there have been a number of cases where the hearing on the Fourth Amendment claims has followed the trial. See, *e.g.*, *United States* v. *Birrell*, 470 F.2d 113 (2d Cir. 1972); *United States* v. *Cole*, 463 F.2d 163 (2d Cir. 1972), *cert. denied*, 409 U.S. 942 (1973).

As to defendant's claim that he is somehow worse off than if Judge Gagliardi ruled on his motion prior to trial (Deft's Br. p. 9), this is not so since the Government would have then been able to have the search and seizure issues resolved on their merits by this Court. This is essentially what the Government seeks to have resolved here on this appeal, and what the defendant is attempting to thwart by his contentions as to nonappealability.

Finally, with respect to the Tenth Circuit cases upon which Ceccolini purports to rely, we note that *United States* v. *Kopp* went off on the factual determination that the only consequence of a reversal would be to retry the defendant; and we respectfully advise the Court that we have learned from the Solicitor General's office that petitions for certiorari have been filed in those cases. In the instant case, by contrast, reversal would merely mean the reinstatement of Ceccolini's conviction without any need for a retrial, thereby bringing the case within the *Wilson-Jenkins* rationale.

POINT I

The trial court improperly suppressed Lois Hennessey's uncoerced, voluntary testimony.

In response to the Government's brief on appeal, Ceccolini argues that Miss Hennessey's testimony should be suppressed because it was discovered directly as a result of the search. (Deft's Br. pp. 13, 14). This argument is totally without merit. As the Supreme Court held in *Wong Sun*:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light *but for* the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by *exploitation* of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (emphasis added) 371 U.S. 471, at 488 (1963).

Under the circumstances of this case, there was no exploitation and, indeed, means were used which were sufficiently distinguishable to purge any primary taint. Here, Patrolman Biro, who was on school-crossing duty, (Tr. 203) entered the Sleepy Hollow flower shop, on his break, to enjoy a smoke and have a friendly chat with Miss Hennessey. Once inside the flower shop, he accidentally happened upon an open envelope containing money and policy slips, and merely asked Miss Hennessey

whose envelope it was (Tr. 66, 185-189).* He then left the envelope where he found it and departed.**

Miss Hennessey's initial interview with FBI Agent Emory was likewise uncoercive. Agent Emory asked Miss Hennessey if she would be willing to help the Government and she said she would. (Tr. 390). As Judge Gagliardi found (App. 16a), Emory was totally unaware that Biro's search may have been illegal. (Tr. 362).*** No threats of any kind were here utilized.

These facts make the case readily distinguishable from *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964) and *United States* v. *Karathanos*, Dkt. No. 75-1322 (2d Cir. 2 2 76). In *Tane*, the witness would not speak until he was confronted with the illegally seized tape recording and told that a conversation had been taped which

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* As we noted in our initial Brief (p. 9n.), their is at least a close question as to whether Biro's perusal of the envelope constitutes a Fourth Amendment violation as to which Ceccolini can complain. This Court can properly address this issue on this appeal. *United States* v. *Tortorello*, Dkt. No. 75-1376 (2d Cir. 4 1 76) pp. 2879, 2882-2883.

** Appellee has misstated the facts when he suggests that Miss Hennessey was "interrogated and constrained" by Biro. (Deft's Br. p. 15). That characterization is at odds with Biro's testimony, and with Miss Hennessey's own testimony that she did not consider the incident important. (Tr. 143). Contrary to Ceccolini's assertion (Deft's Br. p. 17), there is nothing in the record to the effect that Biro replaced the envelope to cover his tracks. Had he really wanted to "cover his tracks," Biro would not have asked Miss Hennessey any questions.

*** Judge Gagliardi's finding is supported by the record (Tr. 362), and defense counsel's arguments about the "silver platter" doctrine (Deft's Br. p. 14) cannot suffice to make Emory's lack of knowledge about any illegality in the search and his good faith in interviewing Miss Hennessey into a situation involving purposeful and flagrant official misconduct.

implicated him—a truly exploitive use (329 F.2d at 853). In *Karathanos*, the illegal warrant was used by INS agents to search the premises and to seize the same illegal aliens whom the Government wished to use as witnesses. Their testimony was prompted by the Government's leverage over these witnesses in deciding whether to prosecute and deport them (p. 1729). *Karathanos*, too, involved an exploitive use of the illegality.

Here, by marked contrast, there was no leverage of any kind utilized by FBI Agent Emory; nor did Emory even question Miss Hennessey specifically about the December 18, 1974 incident. (Tr. 109-110). Thus, Miss Hennessey's testimony should not have been suppressed. The result we urge is in accord with such cases as *United States* v. *Williams*, 436 F.2d 1166 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1972), in which the police, immediately after conducting an illegal search, spoke to defendant's neighbor from whom they received crucial information implicating defendant in a bank robbery. That information and the leads derived were not suppressed. *See also United States* v. *Bacall*, 443 F.2d 1050 (9th Cir. 1971), *cert. denied*, 404 U.S. 1004 (1971) (another case of "investigatory serendipity" where there was no suppression).* Quite similar to this case is *People* v. *Scharfstein*, 277 N.Y.S. 2d 516 (Sup. Ct. 1969), in which the witnesses were discovered as a result of an illegal wiretap. However, unlike *Tane* and *Karathanos*, the wiretaps were not used to coerce the witnesses into testifying or to otherwise exert leverage over them. The Court, therefore, did not suppress their testimony.

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* Similar to the situation in *Williams* and *Bacall*, Ceccolini was not prosecuted for the original crimes uncovered by the December 18 intrusion. The charge in this case involves a subsequent perjury, not gambling violations.

The above cases apply the basic policy behind the exclusionary rule which is deterrence of future improper police conduct. In this case, Biro, during a smoking break from his school-crossing patrol, accidentally stumbled upon Miss Hennessey as being knowledgeable as to Ceccolini's gambling activities. FBI Agent Emory briefly questioned the witness, in good faith, without knowing about the alleged illegality in the search. Under such circumstances, application of the exclusionary rule is inappropriate.

Appellee also argues that Miss Hennessey's statements were not an act of free will and therefore could not purge the taint. (Deft's. Br. p. 15). The facts clearly show that Miss Hennessey was a police science student interested in helping the Government (Tr. 125-126, 143, 390) who freely and voluntarily furnished her testimony. The exercise of her free will in the circumstances here presented was clearly sufficient to purge any possible taint. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 876 n.2 (1975); *Smith and Bowden* v. *United States*, 324 F.2d 879 (D.C. Cir. 1963) (Burger, *J.*), *cert. denied*, 377 U.S. 954 (1964); *Brown* v. *United States*, 375 F.2d 310, (D.C. Cir. 1966), *cert. denied*, 388 U.S. 915 (1967); see also, *Smith* v. *United States*, 344 F.2d 545 (D.C. Cir. 1965).

POINT II

The trial court erred when it suppressed Lois Hennessey's testimony since she would have been discovered as the normal output of the Government's investigation, even if the December 18, 1974 intrusion had not occurred.

Ceccolini argues that Lois Hennessey would never have been discovered in the normal course of the investigation. The Government respectfully refers the Court to our initial Brief (pp. 11-16) and points out that Ceccolini makes several misstatements of the facts in his brief which significantly detract from the conclusions he is urging upon this Court.*

He argues, for example, that Lois Hennessey terminated her employment at the Sleepy Hollow flower shop in February 1974 (Deft's. Br. p. 13) and was not interviewed by the FBI until "months later." (Deft's Br. p. 20); the thrust of Ceccolini's contention being that the investigation would not have reached Miss Hennessey as a long-since terminated ex-employee. Contrary to Ceccolini's erroneous assertions, however, is the fact that Miss Hennessey's employment was terminated in February of 1975. (Tr. 60). Very shortly thereafter, Miss Hennessey was interviewed by the FBI in March or April of 1975. (Tr. 108). Furthermore, common sense indicates that the investigation would cover employees, such as Miss Hennessey, who worked at the flower shop during the period of the surveillance in 1973.

Ceccolini also argues that it would be unlikely that Miss Hennessey would have been contacted given the

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* In passing we would note that there are various factual misstatements in Defendant's Brief which we will not specifically comment upon, except insofar as they are relevant to the issues here presented.

fact that other employees were not contacted until after the defendant was indicted (Deft's Br. pp. 13, 18), and that one ex-employee, Mrs. Pesce, was never contacted (Deft's Br. p. 20). This argument is falacious, since Miss Hennessey was the most appropriate employee to contact, entirely apart from the December 18, 1974 incident. She worked at the flower shop six days a week during a significant portion of the period of the 1973 FBI surveillance. (Tr. 60). Miss Vitagliano did not begin her employment until February of 1975 (Tr. 411) and, therefore, had no knowledge as to events in 1973. Miss Kosilla testified that she worked "on and off, not steady" (Tr. 424); Mike Whalen was a delivery boy and did not spend much time in the shop (Tr. 442); Mrs. Pesce worked for only two months in the fall of 1974 (Tr. 438). It is also noteworthy that these witnesses were contacted not only in connection with Ceccolini's perjured testimony, but also in connection with the overall gambling investigation, involving various people including Millow. Millow testified before the grand jury in October 1975, *In re Millow*, 529 F.2d 770, 771 (2d Cir. 1976). It thus seems clear that Miss Hennessey would sooner or later have been discovered during the investigation. FBI Agent Emory, whose testimony Judge Gagliardi totally credited, stated that he would have contacted employees eventually (Tr. 386) and Judge Gagliardi, during trial, expressed the view that he could not "imagine that any agency of any government not interrogating that witness [*i.e.*, Miss Hennessey] regardless. . . ". (Tr. 215).

Ceccolini misleadingly states that no employees of any other business on Beekman Avenue were ever contacted. (Deft's Br. pp. 2, 13, 18). To the contrary, the record shows that Mr. Maladrino, who owned a sandwich shop on the block next to the flower shop, was subpeonaed by the grand jury. (Tr. 389).

Finally, Ceccolini argues that the interview with Miss Hennessey radically changed the course of the investigation (Deft's Br. p. 18). There is no support for this claim in the record. On the contrary, since the intrusion occurred on December 18, 1974 and was reported by Patrolman Biro to his superiors on December 19, 1974 (Tr. 204), the failure until March or April 1975 to approach Miss Hennessey would show no radical change in plans.

For the reasons stated above and in our initial Brief, we respectfully submit that Miss Hennessey would, in any event, have been contacted in the normal course of the investigation.

POINT III

Miss Hennessey's testimony should have been admitted in a perjury prosecution where, as here, the perjury occurred after the allegedly illegal intrusion.

Initially, Ceccolini attempts to meet the Government's argument—that the deterrence rationale of the exclusionary rule should not shield the defendant's deliberate and wilful falsehoods in his grand jury testimony which occurred five months after the December 1974 intrusion—by urging that the Government waived this issue by not raising it below. As applied to a perjurer who would otherwise have no valid basis for thwarting his flagrant affront of the grand jury's investigative powers, this contention is utterly without merit. *United States* v. *Tortorello*, Dkt. No. 75-1376 (2d Cir. 4/1/76) pp. 2879, 2882-2885, see *United States* v. *Lisk*, 522 F.2d 228, 231 n.8 (7th Cir. 1975) (Stevens, *J.*) and cases cited.*

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* Both *Tortorello* and *Lisk* hold that this Court is not bound to accept stipulations and concessions by the Government as to

[Footnote continued on following page]

Ceccolini claims to distinguish *United States* v. *Turk*, 526 F.2d 654 (5th Cir. 1976) and *United States* v. *Raftery*, Dkt. No. 75-2021 (9th Cir. 4 12 76) (a copy of which is contained in the Appendix hereto ("R. App.")) on the ground that when he appeared in the Grand Jury he was unaware that an illegal search had taken place. This purported distinction is unpersuasive since *Raftery* explicitly accepts the Government's position that "*the exclusionary rule should not be extended to prevent a conviction for perjury occurring after the illegal seizure has taken place.*" *United States* v. *Raftery*, (R. App. 3a) (emphasis supplied).* See also *United States* v. *Lucchetti*, Dkt. No. 75-1221 (2d Cir. 3 4 76) pp. 2351, 2370-2371; *United States* v. *Artieri*, 491 F.2d 440, 445-447 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974).

Moreover, as was true in *Raftery* (R. App. 6a), the commission of Ceccolini's perjury in a federal grand jury proceeding was entirely outside the control of Patrolman Biro.

Finally, as to Ceccolini's citation of *United States* v. *Mandujano*, — U.S. —, 44 U.S. Law Week 4629 (5 10 76).** We not that there the Court recognized

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issues of law. The instant case—in which defendant claims that failure to raise an issue below precludes argument on appeal—follows *a fortiori* and, indeed, *Tortorello* is virtually on all fours with the instant case.

* We note that *United States v. Turk*, 526 F.2d 654, 667 (5th Cir. 1976), recognizes that the Fifth Circuit left open the question and was not specifically extending its holding to cover the instant case; however, the rationale of both *Raftery* and *Turk* should apply to a subsequent perjury prosecution, regardless of a defendant's state of knowledge as to the intrusion, particularly under the circumstances here posed, since the deterrence value would appear to be virtually non-existent.

** The cases cited in the footnote on page 24 of Ceccolini's Brief are all inapposite.

that:

> "[O]ur cases have consistently—indeed without exception—allowed sanctions for false statements or perjury; they have done so even in instances where the perjurer complained that the Government exceeded its constitutional powers in making the inquiry [citations omitted]" 44 U.S. Law Week at 4633.*

The fact of the matter is that Ceccolini is a clear-cut perjurer who deliberately violated his oath to give truthful testimony in the grand jury, as Judge Gagliardi correctly concluded, and what minimal, if any, deterrence values to future police conduct may be served by nullifying his conviction do not support application of the harsh exclusionary rule to the rather unusual circumstances of the case at bar.

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* Ceccolini's entrapment claims are meritless, particularly in light of *Mandujano* and in light of the fact that just three days before he appeared in the Grand Jury he had a conversation with Millow, wherein he was counseled:

> "You are going downtown Monday to see the big boys . . . and whatever they ask you, just tell them you don't remember, because if you don't remember, that is not lying." (Tr. 168). *United States* v. *Remington*, 208 F.2d 567 (2d Cir. 1953), *cert. denied*, 343 U.S. 907 (1954); see *Hampton* v. *United States*, 44 U.S. Law Week 4542 (4/27/76)

We note in passing that Francis J. Millow is not a complete stranger to this Court. *In re Millow*, 529 F.2d 770 (2d Cir. 1976). The doctrine of entrapment would appear to have no application to this case, since, just as he was advised by the prosecutor, Ceccolini was not a target of the investigation. And, of course, Ceccolini has not been named as a defendant in connection with the substantive indictments obtained as a result of the investigation. See *United States v. Lawrence Centore, et al.*, 76 Cr. 141 and 76 Cr. 377. Ceccolini's entrapment contentions are accordingly of no avail. *United States* v. *Winter*, 348 F.2d 204, 208, 209 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965).

CONCLUSION

The order of the District Court should be reversed and the conviction on Count One should be reinstated.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 75-2021

[April 12, 1976]

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

JOHN JOSEPH RAFTERY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

OPINION

Before: CHAMBERS and KOELSCH, Circuit Judges, and JAMESON,* District Judge

JAMESON, District Judge:

Appellee, John Joseph Raftery, was charged in an indictment with perjury before a grand jury in violation of 18 U.S.C. § 1623. The district court denied his motion to dismiss the indictment, but granted his motion to suppress evidence seized in a prior criminal prosecution in state court. The Government has appealed from the suppression order. The indictment is pending, awaiting the outcome of this appeal.

* Honorable W. J. Jameson, United States Senior District Judge for the District of Montana, sitting by designation.

Based upon an affidavit of a Nevada narcotics agent, a California Justice of the Peace on September 12, 1972 issued a warrant to search Raftery's residence in Squaw Valley. Federal, Nevada and California law enforcement officers had received information that "hashish oil" (liquid marijuana resin) was being manufactured in the residence. The warrant found "probable cause" and commanded the officers "to make immediate search in the daytime (or at any time of the day or night, good cause being shown therefor) of the premises". The warrant was issued at 9:30 P.M. State and federal officers executed the warrant at 6:15 A.M. on the morning of September 13. They found Raftery and six other persons at the residence, a large quantity of equipment used for refining hashish, a quantity of hashish, and smoking equipment. Some of the items were found in Raftery's bedroom, where he was arrested.

Raftery and the other persons found in the residence were indicted in state court for various narcotics offenses. They moved to suppress the evidence which had been seized on the ground that under California Penal Code § 1533, a warrant may be served at night (defined as 10:00 P.M. to 7:00 A.M.) only when the magistrate expressly indicates in writing on the warrant that he is authorizing a nighttime search.[1] The motion to suppress was granted on April 6, 1973. The indictments were also dismissed because, in light of the suppression, the evidence was insufficient to prosecute.

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[1] Two California appellate courts have held that § 1533 requires the magistrate to "insert a direction" in the warrant to authorize a night search and that the "failure of the magistrate to mark the form appropriately cannot be held to be equivalent to such insertion". *Powelson* v. *Superior Court*, 9 Cal.App.3d 357, 363, 88 Cal. Reptr. 8 (1970). See also *People* v. *Mills*, 251 Cal. App.2d 450, 59 Cal.Reptr. 489 (1967) and *Call* v. *Superior Court*, 226 Cal.App.2d 163, 71 Cal.Reptr. 546 (1968).

Raftery appeared before a federal grand jury on January 23, 1973 and on later dates and testified concerning his participation in marijuana smuggling and distribution activities. Before giving this testimony he was granted use and derivative use immunity and was ordered to testify. In testimony given on May 24, 1973 Raftery was asked whether he had ever taken part in or been on premises where hashish oil was manufactured. To each question he answered "No". Based on this testimony and upon the evidence obtained in the search of Raftery's residence the grand jury indicted Raftery for perjury.

The district court concluded that the indictment was proper, but that the items seized in the search of Raftery's residence in the state criminal prosecution would not be admissible in evidence in the federal perjury prosecution. The Government contends, inter alia, that the exclusionary rule should not be extended to prevent a conviction for perjury occurring after the illegal seizure has taken place. We agree.[2]

In *United States* v. *Winsett*, 518 F.2d 51, 53 (1975) this court discussed the rationale and limitations of the exclusionary rule. We noted that "The judicially created remedy was designed not to compensate for the unlawful invasion of one's privacy but to deter future unlawful police conduct", citing *Elkins* v. *United States*, 364 U.S. 206 (1969). As we recognized in *Winsett*, "The rule has never been interpreted to proscribe the use of illegally

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[1] Having reached this conclusion, it is unnecessary to consider the other contentions of the Government.

[2] In *Winsett* it was held that the exclusionary rule should not be extended to probation revocation hearings, since the potential harm to the function of the proceedings would substantially outweigh any benefits of its minimal deterrent effects. *Winsett* was followed in *United States* v. *Vandemark*, 522 F.2d 1019 (9 Cir. 1975).

seized evidence in all proceedings or against all persons. *United States* v. *Calandra*, 414 U.S. at 348".[1]

In *Calandra*, 414 U.S. 338 (1974), the Court refused to extend the exclusionary rule to grand jury proceedings, holding that a witness summoned before a grand jury may not refuse to answer questions on the ground that they are based on illegally obtained evidence.[2] Weighing "the benefits, to be derived from [an] extension of the exclusionary rule" against the "potential damage to the role and functions of the grand jury" (414 U.S. 350), the Court concluded that to extend the rule would achieve only a "speculative and minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury". Id. at 351-352.

In *Walder* v. *United States*, 347 U.S. 62 (1953) the defendant testified on direct examination that he had never possessed any narcotics. To impeach this testimony the Government introduced the testimony of an officer who had participated in an unlawful search and seizure in an earlier case. In holding that this evidence was admissible solely for the purpose of attacking the defendant's credibility, the Court said in part:

> "It is one thing to say that the Government cannot make an affirmative use of evidence un-

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[1] The opinion in *Calandra* continues: "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served". 414 U.S. at 348.

[2] A witness summoned to appear and testify before a grand jury refused on Fifth Amendment grounds to testify regarding illegally seized evidence. The Government then requested immunity, after which the district court held that the witness need not answer any grand jury questions based on the suppressed evidence. The court of appeals affirmed, and the Supreme Court reversed.

> lawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine [*Weeks* v. *United States*, 232 U.S. 383 (1914)] would be a perversion of the Fourth Amendment.
>
> "[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U.S. at 65.

Following *Walder*, it was held in *Harris* v. *New York*, 401 U.S. 222 (1971), that statements inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), may be used for impeachment purposes to attack the credibility of the defendant's testimony. The Court concluded that "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent statements". (384 U.S. at 226.

In the recent case of *Oregon* v. *Hass*, 420 U.S. 714 (1975), the rule of *Harris* was followed where a suspect in police custody had been given the *Miranda* warnings, had stated he would like to telephone a lawyer, but was told he could not do so until he reached the station. He then provided inculpatory information. The Court held that this information was admissible solely for impeachment purposes after he had given contrary testimony at the trial. The Court concluded that, as in *Harris*, 'the shield provided by *Miranda*, is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances". 420 U.S. at 722.

We recognize that none of the cases cited *supra* is precisely in point factually; but we conclude that the principles enunciated are applicable. The deterrent effect of excluding the evidence resulting from the illegal search would be minimal.[6] We agree with the Government that the "remedial objectives" of the exclusionary rule were fully served by the suppression of the seized evidence and dismissal of the state court criminal proceedings and by the granting of immunity to Raftery.

The alleged perjury occurred before a grand jury in the federal court after the illegal seizure and suppression of the evidence in the state court. Its commission was outside the control of the prosecutorial officers in the state court action. Under *Calandra* a witness is required to testify before a grand jury and may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. He should not be allowed to commit perjury in that testimony. The purpose of the exclusionary rule was satisfied when the state officials were forbidden to use the illegally obtained evidence to prove the narcotics offenses. The purpose of the rule would not be served by forbidding the Government from using the evidence to prove the entirely separate offense of perjury before

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[6] Moreover, it should be noted that the prosecution was aborted by a negligent act of a magistrate in failing to meet a technical requirement of the California statute when he signed the warrant. Clearly the "imperative of judicial integrity" would not be offended by the use of this evidence in the trial on a perjury charge in federal court which occurred after the evidence had been seized and suppressd in the state court. See *United States v. Peltier*, 422 U.S. 531 (1975).

[7] The illegal search and seizure occurred on September 13, 1972. The evidence was suppressed in state court on April 6, 1973. The alleged perjurious testimony was given on May 21, 1973 when Raftery was aware of the illegal seizure and suppression of the evidence.

a grand jury occuring after the illegal search and seizure and suppression of the evidence in the state court.

The Fifth Circuit in the recent case of *United States* v. *Turk*, 526 F.2d 654, 667 (1976), reached the same conclusion in a similar factual situation, holding that "evidence obtained in an illegal search may properly be admitted in the perjury trial of a victim of the search when the alleged perjury occurred after the search and with the knowledge on the part of the victim that the search had taken place".

Reversed and remanded for further proceedings consistent with this opinion.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAURIE E. FOSTER, being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of June, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

GREENSPAN & AURNOU
14 Mamaroneck Avenue
White Plains, New York 10601

ATT: Joel Martin Aurnou, Esq.

And deponent further says that she sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

LAURIE E. FOSTER

Sworn to before me this

7th day of June 1976

LAWRENCE FARKASH
Notary Public, New York State
No. 24-0603660
Qualified in Kings County
Comm. Expires March 30, 1977